

December 7, 2000

The Short Guide to Counting Electoral Votes

Electoral votes are formally counted by the United States Senate and House of Representatives meeting jointly. U.S. Const. Amend. 12. The joint session is scheduled to convene in the House chamber at 1:00 p.m. on **Saturday, January 6, 2001**, see 3 U.S.C. §15, and it is to continue in session until a result is declared, 3 U.S.C. §16.

The joint session is presided over by the President of the Senate, i.e. the Vice President of the United States, U.S. Const. Amend. 12, & 3 U.S.C. §15. Albert Gore, Jr., will be the Vice President until noon January 20, 2001, see U.S. Const. Amend. 20. (In 1969, Vice President Hubert Humphrey (who had lost the presidential election) declined to preside over the joint session and the duty fell to the Senate's president *pro tempore*.) The Vice President has the statutory duty to preserve order, 3 U.S.C. §18, but the statute is silent on his authority (if any) to *decide* questions of order. **No debate is allowed in the joint session and no question is to be "put by the presiding officer except to either house on a motion to withdraw."** *Id.*

The presiding officer opens the sealed and certified electoral votes in alphabetical order of the States (and the District of Columbia, U.S. Const. Amend. 23), **and the papers are read by four tellers** who are to be appointed by the two houses of Congress before the joint session begins, 3 U.S.C. §15. (Typically, the tellers are the chairman and ranking minority member of the Senate Committee on Rules and Administration and the House Committee on House Administration.) After the votes have been read, the tellers record and count the votes. *Id.* The presiding officer then announces whether any candidate has received the necessary votes for President or Vice President. If so, his "announcement shall be deemed a sufficient declaration" of election. *Id.* (The process has sometimes been expedited by less formal proceedings, but informality is not anticipated in 2001.)

The winning candidate for President and Vice President must receive "a majority of the whole number of Electors appointed." U.S. Const. Amend. 12. **There are two interpretations of that language, however.** Some believe that a winning presidential candidate must receive a majority of *all* electoral votes that have been allotted (currently, 270 out of a possible 538), but others believe that the election can be won with a simple majority of the votes cast, whatever those numbers might be. There seems to be some historical support for both interpretations.

When the electoral votes from a State are read, "the President of the Senate shall call for objections, if any." **An objection must be written and must be signed by at least one Senator and one Representative.** The objection "shall state clearly and concisely, and without argument, the ground thereof." 3 U.S.C. §15.

The general grounds for objecting to an electoral vote appear to be either that it was not "regularly given" or that it was not "lawfully certified" or both. See 3 U.S.C. §15.

When an objection is received, the joint session does *not* resolve the question but the joint session is suspended and the two houses meet separately to vote on the objection. "No votes or papers from any other State shall be acted upon until the objections previously made . . . shall have been finally disposed of." 3 U.S.C. §15.

Based on the procedure in 1969, **it appears that both houses must concur for an objection to be sustained. If both houses do not accept the objection, the objection fails and the electoral votes are counted as offered.** Also in 1969, the presiding officer in both houses held that a motion to table the objection was not in order.

Once the joint session has been suspended and the Senate and House of Representatives have parted to deliberate separately, **the statute limits debate to not more than two hours** (in each house), during which a member may speak only once and for not more than five minutes, **and then the presiding officer's "duty" is to "put the main question without further debate."** 3 U.S.C. §17. Notwithstanding the statute, in 1969 the Senate, by unanimous consent, decided to allocate the time differently. That event lends additional support to the view that **at least some of the statutory provisions are but rule-making provisions of law which either the Senate or the House can alter unilaterally for application within its own body.**

After the two houses have voted separately, they return to joint session. 3 U.S.C. §15.

The statute contains several presumptions, although the presumptions may not be as clear or as easily applied as stated here: For example, there is a presumption (which is said to be "conclusive") in favor of electors appointed under State laws passed before election day and whose appointment is settled "at least six days before the time fixed for the meeting of the electors." 3 U.S.C. §15 & §5. (The electors meet this year on December 18.) If the Senate and the House of Representatives disagree with respect to an electoral vote, the statute gives a presumption to the electors whose appointment was certified by "the executive of the State, under the seal thereof." The statute seems to intend that the presumption would be irrebuttable because it says that such electoral votes "shall be counted." 3 U.S.C. §15. These provisions help explain some of the legal maneuvering that is going on in Florida.

This document outlines in simplified form some of the procedures that will be followed when Congress counts the electoral votes on January 6, 2001, but there are difficult questions of law and policy that are not discussed here. For a fuller treatment of some of those questions, the reader may begin with "Overview of Electoral College Procedure and the Role of Congress," a 7-page memorandum dated Nov. 17, 2000, by Stanley Bach and Jack Maskell of the Congressional Research Service of the Library of Congress.

Staff Contact: Lincoln Oliphant, 224-2946